

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANTHONY WRIGHT,
Petitioner,

v.

KENNETH QUINN,
Respondent

No. CV-06-211-FVS

ORDER DISMISSING PETITION

KENNETH QUINN,
Respondent

THIS MATTER comes before the Court based upon Anthony Wright's petition for a writ of habeas corpus. He is represented by Jeffrey is; the respondent by Assistant Attorney General John Samson.

BACKGROUND

Several gunmen shot repeatedly at a house which was occupied by adults and children. A bullet struck and killed a child. Law enforcement officers suspected that Anthony Wright was involved in the shooting. At some point thereafter, investigators received a tip from a prison guard. He had intercepted a telephone call from a woman to an inmate named David Haynes.¹ Mr. Haynes asked the woman about "Snoop," which is Mr. Wright's nickname. The woman said "that Snoop was 'real sick and taking antibiotics.'" The guard provided the caller's telephone number to investigators. One of them called the

The identity of the woman is unclear.

1 number and spoke to Ellen Fulmer. She furnished information that
2 prompted him to call Rana Garrett. Not only did Ms. Garret implicate
3 Mr. Wright in the shooting, but also she played an important role in
4 his arrest and testified against him at trial.² A jury convicted him
5 of one count of murder in the first degree, one count of attempted
6 murder in the first degree, and six counts of first degree assault.
7 The Washington Court of Appeals affirmed his conviction and the chief
8 judge of that court later denied his request for post-conviction
9 relief. He filed a petition for a writ of habeas corpus that presents
10 essentially three exhausted claims. One is that his attorney deprived
11 him of effective assistance in violation of the Sixth Amendment by
12 failing to seek the suppression of Ms. Garrett's testimony. Another
13 claim is that his attorney deprived him of effective assistance by
14 failing to object to a statement that the prosecutor made during the
15 course of closing arguments. The third claim is that the cumulative
16 impact of his attorney's errors warrants habeas relief.
17

18 **STANDARD**

19 Mr. Wright is entitled to habeas relief only if the adjudication
20 of his claims by the Washington Court of Appeals: (1) was "contrary
21 to, or involved an unreasonable application of, clearly established

22 Some of the facts set forth above are drawn from a report
23 which was prepared by Spokane Police Detective Kip Hollenbeck; a
24 report Mr. Wright attached to the "Statement of Additional
25 Grounds for Review" that he submitted to the Washington Court of
26 Appeals during the course of his direct appeal. (Submission of
Relevant State Court Record, Exhibit 5.)

1 Federal law, as determined by the Supreme Court," or (2) "was based on
2 an unreasonable determination of the facts in light of the evidence
3 presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).
4 See *Carey v. Musladin*, 549 U.S. ----, ----, 127 S.Ct. 649, 653, 166
5 L.Ed.2d 482 (2006).

6 **FAILURE TO FILE SUPPRESSION MOTION**

7 Mr. Wright alleges that the guard unlawfully intercepted the
8 telephone call from the unidentified woman to Mr. Haynes. According
9 to Mr. Wright, the guard's act set in motion a chain of events that
10 enabled law enforcement officers to obtain Ms. Garrett's cooperation.
11 Mr. Wright alleges that his attorney should have moved to suppress her
12 testimony on the ground that it was the fruit of an unconstitutional
13 act.

14 Mr. Wright must demonstrate that his attorney's performance was
15 deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct.
16 2052, 2064, 80 L.Ed.2d 674 (1984). In order to do so, he must show
17 that the guard's conduct arguably infringed his Fourth Amendment
18 rights. See *Rakas v. Illinois*, 439 U.S. 128, 138, 99 S.Ct. 421, 428,
19 58 L.Ed.2d 387 (1978) ("the rights assured by the Fourth Amendment are
20 personal rights, which may be enforced only at the instance of one
21 whose own protection was infringed by the search and seizure")
22 (internal punctuation and citation omitted). Absent such a showing,
23 Mr. Wright's first ineffective assistance claim necessarily fails.

24 Mr. Wright has cited no evidence indicating that he participated

1 in the telephone call to Mr. Haynes. Nor has Mr. Wright cited any
2 evidence indicating that the unidentified woman was at his residence
3 when she made the call. Thus, as far as the Fourth Amendment is
4 concerned, Mr. Wright lacked authority to challenge the guard's
5 interception of the call. See *Alderman v. United States*, 394 U.S.
6 165, 176, 89 S.Ct. 961, 968, 22 L.Ed.2d 176 (1969) (accused could
7 challenge the constitutionality of electronic surveillance "if the
8 United States unlawfully overheard [his] conversations . . . or
9 conversations occurring on his premises, whether or not he was present
10 or participated in those conversations").

12 Mr. Wright would not be able to establish "standing³" merely by
13 alleging that he participated in the telephone call or that the woman
14 called from his residence. To begin with, there is no evidence that
15 either he or the woman had a subjective expectation of privacy in a
16 telephone conversation with a prison inmate. Furthermore, he has not
17 demonstrated that such an expectation, even if it existed, is one
18 which society would be prepared to recognize. See *United States v.*
19 *Sababu*, 891 F.2d 1308, 1329 (7th Cir.1989) (defendant was aware that
20 prison officials were authorized to monitor her calls to an inmate).
21 Cf. *Shell v. United States*, 448 F.3d 951, 956 (7th Cir.) (a visitor
22 has a "greatly diminished expectation of privacy while communicating
23

25 "The term 'standing' is often used to describe an inquiry
26 into who may assert a particular fourth amendment claim." *United
States v. Taketa*, 923 F.2d 665, 669 (9th Cir.1991).

1 with a prison inmate"), cert. denied, --- U.S. ----, 127 S.Ct. 327,
2 166 L.Ed.2d 245 (2006); *United States v. Van Poyck*, 77 F.3d 285 (9th
3 Cir.) ("any expectation of privacy in outbound calls from prison is
4 not objectively reasonable and that the Fourth Amendment is therefore
5 not triggered by the routine taping of such calls"), cert. denied, 519
6 U.S. 912, 117 S.Ct. 276, 136 L.Ed.2d 199 (1996).

7 In sum, there is no reason to think Mr. Wright had standing under
8 the Fourth Amendment to challenge the guard's interception of the
9 telephone call from the unidentified woman to Mr. Haynes. As a
10 result, it would have been futile for his attorney to move to suppress
11 Ms. Garrett's testimony on the ground that it was the fruit of a
12 Fourth Amendment violation. It follows that the Washington Court of
13 Appeals properly rejected Mr. Wright's contention that he was deprived
14 of effective assistance by his attorney's failure to seek the
15 suppression of Ms. Garrett's testimony on that ground.

16 **FAILURE TO OBJECT**

17 During his closing argument, the prosecutor said, "The defendant
18 also told of his involvement in this case to David Haynes." The
19 prosecutor's statement was inaccurate. Although Mr. Haynes had
20 testified, he had not related anything that Mr. Wright allegedly told
21 him. Mr. Wright's trial attorney immediately recognized the
22 inaccuracy. Nevertheless, he did not object. Later, in moving for a
23 new trial, he explained, "I didn't feel like I wanted to emphasize the
24 fact that the prosecutor had said that essentially Mr. Wright had
25

1 confessed to Mr. Haynes by objecting and having the Court do any type
2 of curative instruction at that time." (Verbatim Report of
3 Proceedings, at 1143.) Mr. Wright alleges that his attorney deprived
4 him of effective assistance by failing to object to the prosecutor's
5 statement.

6 Decisions made by defense counsel during the heat of trial are
7 entitled to deference. *Strickland*, 466 U.S. at 689, 104 S.Ct. at
8 2065. Deference is especially appropriate here because Mr. Wright's
9 attorney had to make a split-second decision. Moreover, in evaluating
10 the decision, the Court must consider the situation from his point of
11 view. *Id.* The prosecutor did not say, "The defendant admitted to Mr.
12 Haynes that he shot at the house." Rather, the prosecutor said, "The
13 defendant . . . told of his involvement in this case to David Haynes."
14 The phrase "told of his involvement in this case" is ambiguous; it
15 could have meant any number of things to the jury. Not only that, but
16 the prosecutor did not dwell on the matter. Instead, he made a single
17 remark and moved on. While the remark was potentially damaging, it
18 was not so egregious as to require an immediate response from Mr.
19 Wright's trial attorney. Consequently, his decision not to object
20 fell within the wide range of professional conduct that is permitted
21 by the Sixth Amendment. See *Dubria v. Smith*, 224 F.3d 995, 1004 (9th
22 Cir.2000) (en banc) (reasonably competent attorney could have
23 refrained from objecting during prosecutor's closing argument), cert.
24 denied, 531 U.S. 1148, 121 S.Ct. 1089, 148 L.Ed.2d 963 (2001). See

1 also *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir.1993)
2 (same); *United States v. Molina*, 934 F.2d 1440, 1448 (9th Cir.1991)
3 (same). The Washington Court of Appeals properly rejected Mr.
4 Wright's contention that his attorney deprived him of effective
5 assistance by failing to object to the statement quoted above.

6 **CUMULATIVE ERROR**

7 Even if neither of the preceding allegations is sufficient to
8 justify habeas relief, Mr. Wright argues that their cumulative impact
9 is sufficient. He is incorrect. Neither of the decisions that Mr.
10 Wright criticizes -- i.e., failing to file a suppression motion and
11 failing to object to inaccurate statement during closing argument --
12 was unreasonable. Where there is no error, there can be no cumulative
13 error. See *United States v. Carreno*, 363 F.3d 883, 889 n.2 (9th
14 Cir.2004).

15 **IT IS HEREBY ORDERED:**

16 Mr. Wright's petition for a writ of habeas corpus is dismissed.

17 **IT IS SO ORDERED.** The District Court Executive is hereby
18 directed to enter this order and furnish copies to counsel.

19 **DATED** this 10th day of September, 2007.

20
21 s/ Fred Van Sickle
22 Fred Van Sickle
23 United States District Judge